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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, INC.,
Petitioners,
against
THE SHANLEY COMPANY,
Respondent.

No. [redacted]427

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

NATHAN BURKAN,
Attorney for Petitioner.

WM. J. HUGHES,
of Counsel.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

IN THE

Supreme Court of the United States

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VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, INC., Petitioners, against THE SHANLEY COMPANY, Respondent.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

TO THE SUPREME COURT OF THE UNITED STATES:

The above named Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., pray for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit in the above entitled cause.

Questions Presented.

The questions presented are:

(1) Whether the performance of a copyrighted musical composition given by paid performers in a public restaurant for the entertainment of its patrons, as a part of the operation of the restaurant business, and for the purpose of attracting patrons, when no special charge is made to the patrons for the privilege of listening to such performance, is a "performance for profit" within the meaning of Section 1, subdivision (*c*) of the Copyright Act.

(2) Whether the proprietor of a dramatico-musical composition who first copyrights the entire work by publishing the same with notice of copyright, and thereafter and in the same year separately copyrights a vocal number thereof by publishing the same with a notice of copyright, which is in every respect identical with the notice of copyright inserted on the entire work, loses the exclusive dramatic performing right in such separately published vocal number by reason of his failure to insert on such re-publication a separate notice of the copyright in the entire dramatico-musical work.

Statement of the Case.

The vocal score of the comic opera entitled "Sweethearts" was copyrighted in the year 1913 as a "dramatico-musical composition," one of the classes specified in Section 5 of the Copyright Act. The copyright was secured by publication with the following notice of copyright, viz.:

"Copyright, 1913, by G. Schirmer."

During the same year the proprietors of said copyright separately published with notice of copyright the vocal number also entitled "Sweethearts" consisting of words and music, which is a component part of said copyrighted vocal score, and a link of the dramatic action of said comic opera. The copyright notice inserted on this separate publication is as follows:

"Copyright, 1913, by G. Schirmer."

The vocal number "Sweethearts" was copyrighted as a musical composition.

The copyrighting of the composition thus secured, so far as this case is concerned, involves two distinct rights: the public performing right as a drama under Section 1 (*d*), and the public performing right for profit as a musical composition under Section 1 (*e*).

The defendant conducts a public restaurant in the City of New York, and as a part of its business gives performances of the kind known as "cabaret" performances for the entertainment of its patrons. These performances are given on a raised platform by an orchestra and singers. No admission fee is charged for the entertainment, but it is intended for patrons, *i. e.*, for persons who purchase food or refreshment.

Under these circumstances the vocal number "Sweethearts," both the words and the music, was performed in defendant's restaurant by a singer and by musicians who were employed by the defendant.

Statutes Involved.

Section 1 of the Act of March 4, 1909, 35 Stat., 1075, provides that:

> "Any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right:
> * * * * * *
> (d) To perform or represent the copyrighted work publicly if it be a drama or,
> * * *
> (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit. * * *"

Section 3 provides:

> "That the copyright provided by this Act *shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting*, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

The proviso to Section 5 is as follows:

> "That the above specifications shall not be held to limit the subject matter of copyright as defined in Section four of this Act, nor

shall any error in classification invalidate or impair the copyright protection secured under this Act."

Section 6 of the Act is as follows:

"That compilations or *abridgments,* adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this act; *but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof,* or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Section 28 provides:

"That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, *such as oratorios, cantatas, masses or octavo choruses by public schools, church choirs or vocal societies,* rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, *provided the performance is given for charitable or educational purposes and not for profit.*"

Decisions of Lower Courts.

The District Court (222 Fed. Rep., 344) dismissed the complaint, holding that the dramatic performing right in the vocal number was lost by reason of its being separately copyrighted as a musical composition, and that the performing right in the vocal number as a musical composition was not infringed because the defendant's performance was not a performance "for profit."

The Circuit Court of Appeals held that the dramatic performing right existing in the vocal number as a part of the copyrighted dramatico-musical work was lost, because the separate publication of the vocal number contained no separate notice of the copyright in the entire work. Considering the vocal number as a non-dramatic musical composition, the Court also held that the defendant's performance of it was not "for profit" and, hence, no infringement.

The decree dismissing the bill of complaint was affirmed.

Reasons for the Allowance of the Writ.

(1) Under this decision the owners of copyrighted operas and other musical compositions will lose the benefit of their copyrights by reason of a new and widely practiced form of appropriating such works.

The giving of "cabaret" entertainments which include the rendition of copyrighted musical compositions and of portions of copyrighted operatic works, has become a regular feature of the opera-

tion of restaurants and hotels. These entertainments are advertised in the public press as parts of the service offered to the public (Rec., page 39, *et seq.*).

The importance of the question presented lies in the fact that many operas and other similar musical productions owe their success almost entirely to a few numbers which receive popular favor, so that the rendition of these numbers at public restaurants seriously interferes with the attendance at licensed performances.

The loss of the dramatic performing right in separately published numbers or selections from operas and similar works will seriously diminish the protection afforded by the copyright in such works. This loss will affect almost all owners of such copyrights, because such re-publications have been printed always with only one copyright notice and have never contained an additional notice of the copyright in the entire work.

(2) As shown hereinafter in the accompanying brief, the English courts hold that a performance such as there was in this case is a public performance for profit. Under Section 1 of the Act, and the Proclamation of the President, the work of an English author or composer is given copyright protection in the United States. A cabaret performance of a portion of his work in the United States under this decision, therefore, would not be a violation of his copyright, while a similar performance in London would be.

(3) The Supreme Court of New York has held in an analogus matter that in an "indirect way a profit was made" out of a moving picture show operated as an inducement to draw trade to an

ice cream saloon, although no entrance fee was charged to such show. See *Weistblatt* vs. *Bingham*, 58 Misc., 328. The state and federal courts, therefore, are opposed in their views of the same proposition of law, thus bringing the case within the rule laid down by this Court in *Forsyth* vs. *Hammond*, 166 U. S., 506, 514, as to the "necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations," by writ of certiorari.

(4) The decision throws doubt on important provisions of the Copyright Act of 1909.

Section 6 of the Act provides that the publication as a new work of any arrangement of a copyrighted work "shall not affect the force or validity of any subsisting copyright" in any matter included in such new publication.

Sections 19 and 46 of the Act indicate that Congress intended to require only one copyright notice on one publication.

Under this decision the separate publication and copyrighting of a selection from a copyrighted opera destroys part of the subsisting copyright in the matter used, unless two notices of copyright are inserted.

(5) Article 1, Section 8, of the Constitution provides that "the Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

While copyright protection is thus provided by the same clause of the Constitution which gives

patent protection, it is apparent that a decision concerning the validity of a patent may affect only those interested in a particular device, but a decision in a copyright case like the one under consideration affects not only the copyright proprietor concerned, but also every other copyright proprietor of a musical composition in the United States and foreign countries similarly situated. The present decision is of peculiar public interest, therefore, in that it concerns *every* owner of a copyrighted musical composition appropriated and used in an unauthorized cabaret performance, which it holds does not infringe upon the protection given by the Act. The more popular a musical composition is, the greater its value to the composer or copyright proprietor, and correspondingly the greater temptation to appropriate it for cabaret and other similar performances. The decision, therefore, has direct bearing upon the protection of intellectual effort by authors and composers, the fostering of which was the purpose of the constitutional provision.

For these reasons, and inasmuch as this is the first case involving a construction of the provisions of the Copyright Act referred to to come before this Court, and inasmuch also as the present is a class case, instituted because it is typical in its facts of many others similar thereto, and because, it is insisted, the decisions below are in direct conflict with the express language and intent of the Act, it is submitted that a writ of certiorari should issue and the questions involved be determined by this Court.

WHEREFORE your petitioners pray that a writ of certiorari may be issued out of and under the

seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify the above cause to this Court for review and determination, as provided by law, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate.

VICTOR HERBERT,
HARRY B. SMITH,
ROBERT B. SMITH,
FRED de GRESAC MAUREL,
G. SCHIRMER, Inc.,
Petitioners.

NATHAN BURKAN,
Attorney for Petitioners.

WM. J. HUGHES,
of Counsel.

United States of America,
State of New York,
County of New York, } ss.:

Victor Herbert, being duly sworn, deposes and says that he is one of the petitioners named in the foregoing petition, that he has read the said petition and knows the contents thereof, that the facts therein stated are true to the best of his knowledge, information and belief.

VICTOR HERBERT.

Subscribed and sworn to before me this
17th day of March, 1916.

ABRAHAM KIPP,
(Seal) Notary Public,
New York County #2001.

BRIEF IN SUPPORT OF THE PETITION.

I.

The performance of a copyrighted musical composition in a public restaurant, given as a part of the operation of such restaurant business, and for the purpose of attracting patrons, is a public performance for profit within the meaning of Section 1, subdivision e of the Copyright Act.

A. *That no direct charge is made to patrons for the performance is immaterial.*

The Circuit Court of Appeals for the Second Circuit has held that the exclusive right defined in Section 1, subdivision (e), is confined to public performances to which an admission fee or some direct pecuniary charge is exacted. A previous ruling made by the same Court in John Church Company vs. Hilliard Hotel Company, 221 Fed., 229, is reaffirmed as follows:

> "It does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel."

This definition of "performance for profit" is not in accord with the ordinary meaning of the words.

A person who operates a restaurant for the purpose of selling food and refreshment for pay is

commonly understood to operate his business for profit.

The record in this cause contains copies of advertisements published in the newspapers for the purpose of attracting patrons to certain popular restaurants (pages 39-51).

The owners of these establishments announce that they will sell a meal for one dollar, or for some other price stated.

The price charged is commonly understood to include a profit for the proprietor who sells it.

A restaurant proprietor who increases the number of persons purchasing his meals increases his profit.

If, for the purpose of bringing about such increase of customers, and therewith of profit, he offers some addition to the service that goes with each meal, he will be commonly understood to furnish such additional service for profit.

It is unquestionable that any increase of profit thus realized is derived from the patrons, although there is no special charge made expressly for such additional service.

For no one may enjoy the additional service unless he purchases a meal or some food or refreshments.

The question whether a performance given in conjunction with the operation of a place of public accommodation is a performance for profit was considered in the New York Supreme Court, in Weistblatt vs. Bingham, 58 Misc., 328—a case involving a motion picture exhibition given in an ice-cream saloon. Judge Crane, in his opinion, said:

> "While no entrance fee is charged for this exhibition, it is evident that it is conducted

for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table, without ordering something, I imagine would not stay very long. In this indirect way a profit is made out of the moving picture show."

The question was considered in England in the case of *Sarpy* vs. *Holland*, 99 Law Times, 317. In that case the defendant Holland who conducted a hotel, employed for pay a band of musicians to play in his establishment. Cozens-Hardy, M. R., said:

"This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay, I think, 16s. a performance. It was obviously part of the means by which he attracted customers, and hoped to gain, and did gain a profit in carrying on the business of the hotel. That being so, it seems to be impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who went in large numbers every night went there not merely in the expectation, but with the certainty that they would not go there, and indeed, could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel."

The conclusion of the Master of the Rolls was not based on the circumstance that the musicians

were paid, but on the fact that the musical performance was part of the means by which customers were attracted and profit was gained.

When the case of *John Church Company* vs. *Hilliard Hotel Company*, *supra*, was heard in the United States District Court, Judge Lacombe took the same view as did the Master of the Rolls in *Sarpy* vs. *Holland*. His decision was as follows:

> "The circumstance that complainant could not prove any specific sum as 'profit' resulting from the playing of the copyrighted music seems to me immaterial. The place was 'public' although all the public could not gather in it and I think, as did the Judges in Sarpy vs. Holland, 99 L. T., 317, that the hotel would not have paid for the playing of the piece unless in some way or other, they were to gain thereby."

An entertainment given for the patrons of a restaurant who are admitted on the understanding that they make some purchase, is not essentially different from an entertainment to which an admission fee is charged.

The admission fee is sometimes disguised. Entertainments are given to which admission may be had on payment for a "hat-check," which entitles the holder to the cloak-room service.

If the proprietor of a dance hall furnishes the dancing floor and music without special charge, but exacts the purchase of a hat-check, is there any difference between the musical performance given by him and that given in a concert hall to which a general admission fee is charged?

The proprietor of the dance hall often sells refreshments to his patrons. He may derive more profit from the sale of refreshments than from the hat-checks and may come to the conclusion that he would attract more patrons and realize on the whole a larger profit by dropping the charge for the hat-check.

He would then admit the public without direct charge and yet he would reap an increased profit from those admitted who would all be expected to make some purchase.

Would it be a reasonable view of the musical performances given in such a dance hall to say that they are for profit while the payment for a hat-check is exacted, and not for profit when no such direct charge is made, but a purchase is "expected"—which means exacted—from the patrons?

(B) *The intention of Congress is shown in other portions of the Copyright Act.*

In construing the language of the copyright statutes, regard should be had to the intention of Congress, and to the object of copyright legislation.

The question of the scope of musical copyright is dealt with in Section 28 of the Copyright Act of 1909.

The second half of Section 28 provides, as follows:

> "Provided, however, that nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or

> [illegible] rented, borrowed or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

This provision indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes, and of the classes above enumerated.

The clause is incompatible with any construction of section 1, sub-division e, which would permit the free production of musical works like the one here involved for purposes of business, w[illegible] might result in personal gain, whether direc[illegible] indirectly.

The copyright act as passed in 1909, w[illegible] by the Committee on Patents of the Ho[illegible] resentatives, collaborating with the Co[illegible]ctee of the Senate. When the bill in its final form was submitted to Congress, the Committee on Patents of the House of Representatives submitted a report recommending the passage of the bill. The report is dated February 22nd, 1909, and is entitled "60th Congress, 2d Session, House of Representatives, Report No. 2222." On page 16 of said Report, it is said as to the latter half of Section 28:

> "The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this

> prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or charitable purposes, and not for profit, it may be done without subjecting those who give the performance to any suit for damages; and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools," etc.

The intention to limit free performances to the instances specified in section 28 is here clearly expressed.

As Congress concurred in the report of the joint Committee and passed the bill in the form recommended in this report, the report may be cited as some evidence of the legislative intent.

The construction of section 1, sub-division e, contended for by the petitioners, is the only construction that is in harmony with the purposes of copyright legislation as they have been long recognized.

The object of copyright legislation is to secure to the author all the benefit that may be derived from the use of his works.

Prior to 1897, composers of musical works not belonging to the class of dramatico-musical works and therefore not entitled to protection as dramatic works, were not entitled to the exclusive performing rights in such compositions.

This inequality of protection was removed by the Act of January 6, 1897, which amended Section 4966 of the Revised Statutes so as to make

it equally applicable to both dramatic and musical compositions. In White Smith Co. vs. Apollo Co., 209 U. S., at page 16, this Court speaking by Mr. Justice Day, said:

> "The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performances."

The revision of the copyright laws which resulted in the passage of the present Act was taken up by Congress in response to a message of President Roosevelt, dated December, 1905, in which the defects of the then existing copyright laws were pointed out and the desirability of so revising the law as to secure the complete protection of authors was urged.

Such being the object of the revision of the copyright laws in the form of the present Act, it is reasonable to assume that Congress had no intention to take away any substantial protection previously granted to composers.

The instances mentioned in Section 28 where the performance of musical works for certain charitable and educational purposes is permitted, do not place the composer to any material extent in a less favorable position than he enjoyed under the law of 1897, because it had long been the prevailing custom to permit free use of musical works for charitable and educational purposes.

The purpose of the Copyright Law would be to a large measure defeated if the permission of free performances were extended beyond the instances specified in Section 28.

The petitioner is entitled to relief if the defendant performed the musical composition for profit. To hold that a performance as a business matter in a public restaurant operated in a business way for profit, is not for profit, simply because no particular part of the receipts of the business due to the performance is isolated or allocated, is contrary to fact. Such a holding should not be permitted, we submit, to stand as representing the law.

POINT II.

When an arrangement of a vocal number or a selection from a copyrighted operatic work is separately copyrighted by publication, a notice of the copyright in such separate number or selection is sufficient to preserve the dramatic performing right subsisting in such number or selection by reason of the copyright in the entire operatic work. The fact that in the application for registration such number is classified as a musical composition does not limit the scope of the copyright previously acquired in such number as a part of the operatic work. An additional notice of the previously acquired copyright in the entire work is not required to preserve all the rights secured by such prior copyright.

The Circuit Court of Appeals held that the proprietor of a general copyright in an operatic work

loses the dramatic performing right in any vocal number or selection therefrom separately published and copyrighted as a musical composition in case he fails to insert on such separate publication a notice stating that the entire operatic work was copyrighted.

This ruling introduces a new requirement as to notice, and a new penalty for the failure to conform to such requirement, which requirement and penalty are at variance with the language and intent of the Copyright Act.

When a composer copyrights his opera by publication, he is not required to state in his notice of copyright whether he classifies it as a dramatic work or as a musical composition. A general notice of copyright is sufficient.

Upon publication with a general copyright notice, the composer or owner of the work acquires all the rights enumerated in Section 1 of the Copyright Act (35 Stat., 1075) which are applicable to his work.

If a work is equally suitable for several of the uses and methods of reproduction mentioned in Section 1, the exclusive right to all of them is secured by publication.

And all these rights are secured before the work is classified. The owner is not required to classify his work until after the copyrighting has been effected. The specification of the class is to be made in the application for registration of the copyright (Section 5).

As all the rights mentioned in Section I have become vested in the copyright proprietor before he classifies his work, his manner of classifying it could only affect his rights by implying an aban-

donment from the selection he makes among the classes mentioned in Section 5.

But Congress expressly forbade any such implication by providing at the end of Section 5 that *"no error in classification shall invalidate or impair the copyright protection secured under this Act."*

Under this saving clause of Section 5 a composer of an opera who copyrights his work by publication and then classifies it as a musical composition, does not lose the right to claim protection for it as a dramatic work.

The same reasoning applies to a part of an opera separately published with notice of copyright, which part is classified as a musical composition.

Like the complete operatic work, a vocal number or selection taken from it may be classified as a dramatico-musical work, or as a musical work.

The fact that the composer or owner classifies it as a musical composition, cannot, under the last clause of Section 5, be held to be an abandonment of any right of protection which existed in such number or selection prior to and independent of such classification.

The decision of the Circuit Court of Appeals furthermore restricts the scope of Section 6 of the Act in a manner which is in conflict with the language and intent of the law. Section 6 provides as follows:

> "That compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished

> with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Under the above section an arrangement of a part of an opera shall be treated and may be copyrighted as a new work, and its publication shall not affect the scope of any copyright previously acquired in any matter included in such new work.

If such an arrangement is to be treated as a new work, only one copyright notice stating the year when such new copyright was secured and the name of the copyright proprietor, is required.

The same view was taken by the Circuit Court of Appeals for the Second Circuit in West Publishing Co. vs. Edward Thompson Co., 176 Fed. Rep., 833, 837, where it was said:

> "Section 6 of the Act of 1909 (Act March 4, 1909), which is obviously declaratory, seems to confirm Justice Clifford's view (in Lawrence vs. Dana, 4 Cliff., 1) that there is but one copyright of the same book, that additions and improvements make a new book, and that the only notice required is of the date of entry of the last edition."

There would be no reason for the provision in Section 6, preserving the full force of any subsisting copyright in any matter used in another

form in a new copyrighted publication, if it were intended that in such new publication notice of the prior copyright must be given.

If two copyright notices were necessary, one of the old and one of the new copyright, the copyright in the old matter as well as in the new matter, or in the new form, would be protected without Section 6.

If notices of two copyrights were required, the work would not be treated as one new work, but as an amalgamation of an old work and a new work.

In respect to the copyright notice, the intent of Congress to avoid the need of more than one notice in one publication is evident.

Section 19 provides that one notice of copyright in each volume or in each number of a newspaper or periodical shall be sufficient.

Section 46 permits the name of the assignee to be inserted in place of the original copyright proprietor, thus making unnecessary the naming of successive copyright owners.

There is also apparent a policy of guarding against the loss or abandonment of copyright by mere mistake or inadvertence. The policy is shown in the closing provision of Section 5 and also in Section 20, which provides that the omission of the prescribed notice by accident or mistake shall not invalidate the copyright.

March 17, 1916.

NATHAN BURKAN,
Attorney for Petitioner.

WM. J. HUGHES,
of Counsel.

MAR 31 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc.,
Petitioners,

against

THE SHANLEY COMPANY,
Respondent,

No. 924 427

On Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT.

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

Abraham L. Gilbert and
FRANCIS GILBERT,
Counsel.

IN THE

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VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc.,
Petitioners,

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THE SHANLEY COMPANY,
Respondent,

No. .....

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Facts.

The complainants are the owners of the copyright of a dramatico-musical composition, known as the comic opera "Sweethearts." In this opera was included a vocal selection known as the waltz song "Sweethearts." After having secured a copyright on the comic opera as a dramatico-musical work, the complainants then separately copyrighted, published and sold the

waltz song "Sweethearts" as a musical composition. This song was performed in a restaurant conducted by the respondent, to which no admission was charged, and the musical entertainment given was incidental to the restaurant business.

The court below definitely decided two propositions.

1. That the copyright of the song "Sweethearts" as a separate musical composition, even if valid, is not infringed by its being rendered in a public restaurant where no admission fee is charged, although the performer is privately paid for rendering it by the proprietor of the resort.

2. That the petitioners cannot claim the benefit of the copyright of the dramatico-musical composition for that portion of the composition which they republished separately and without notice of the copyright previously obtained.

In the statements of the questions set forth in the petition the second question thereof is somewhat incorrectly stated. There is no claim made that the petitioners in separately copyrighting, publishing and selling as a musical composition a portion of a dramatico-musical work lost any future exclusive dramatic performing rights therein, nor did the court below so hold. Its conclusions were confined to the two propositions hereinbefore stated.

And in consideration of the facts as set forth in the petitioner's brief it is to be remembered that there is no claim made herein that the respondent gave a dramatic or theatrical performance of the song in question. In the record are to be found the advertisements of various hotels and restaurants, and from these advertisements it may possibly be inferred that theatrical performances are given in the places

therein specified, but no such claim was made against the respondent herein, and in fact the court below found to the contrary, because in the opinion it is stated "no theatrical performance is given on the premises. None of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume; none of the songs that are sung are ever sung in character."

The application for a writ of certiorari herein, is submitted, we believe, simultaneously with a similar application for a writ of certiorari in the case of The John Church Company against the Hilliard Hotel Company. These two cases involve closely related provisions of the Copyright Law. The Church Company case involves a construction of Section 1, Sub-division E, relating to *musical compositions;* the case at bar involves a construction of Section 1, Sub-division D relating to dramatic works and by implication to *dramatico-musical works.*

The respondent opposes the issuance of a writ of certiorari in this case for the following reasons:

The matter at issue is simple and has been exhaustively examined and clearly determined by the Circuit Court of Appeals for the Second Circuit in two separate cases, Church v. Hilliard, 221 Fed. Rep., 229, and Herbert, et al., vs. The Shanley Company (the case at bar) not yet reported.

In the Church v. Hilliard case it was held, that a performance of a copyrighted musical composition, given by paid performers in a public restaurant for the entertainment of its patrons, as a part of the operation of the restaurant, for the purpose of attracting patrons, when no charge is made to patrons for the privilege of listening to such performance, is not a performance for profit

within the meaning of Section 1, Sub-division e of the Copyright Act.

In the Herbert v. Shanley case it was held that, when the owner of a copyrighted dramatico-musical composition separately publishes, copyrights, and sells, as a musical composition, a song or other musical number which originally formed a part of such dramatico musical composition, a public performance of such musical compostion, unaccompanied by a dramatic action, does not infringe the copyright, unless it is a performance for profit within the meaning of Section 1 of Subdivision e above referred to.

POINT I.

A writ of certiorari should not issue.

A writ of certiorari should not be granted because in the present case there is involved no question of "peculiar gravity and general importance."

> Amercain Company v. Jacksonville, 148 U. S., 372.
>
> In re Woods, 143 U. S., 202, at page 206.

The petition fails to show any divergence of opinion on the questions presented herein, between two or more Circuit Courts of Appeal, or between a Federal Court and a State Court. Nor do any of the issues herein presented affect any interest of this nation. There is no dissent in the opinion of the Circuit Court of Appeals.

> Forsyth v. Hammond, 166 U. S., 514.

POINT II.

The performance of a copyrighted musical composition in a public restaurant to which no admission fee is charged and where the musical entertainment is incidental to the restaurant business, as in the case at bar, is not a performance for profit within the meaning of Section 1, Subdivision E, of the Copyright Act.

A.—As to the Meaning of the Words "for Profit."

The whole controversy herein arises over the meaning of the words "for profit." In the District and Circuit Courts, in both the Hilliard and the Shanley cases, counsel for the publishers urged, as they now urge here, that this expression means "for pay" and also "for any business purpose." This respondent, on the other hand, contends that the expression has no such broad meaning, but refers to performances to hear which an admission fee is charged, regardless of whether the performance produces a profit or is given with that purpose in view.

All parties interested in this litigation have agreed throughout that a performance where an admission fee is charged is a performance for profit.

The Copyright Act is silent as to the meaning of the words "for profit" except in Section I, referring to coin-operated machines, which provides that

> "The reproduction or rendition of a musical composition by or upon coin-operated ma-

chines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

Appellant urges that the performance of music is for profit because it is a part of the service in connection with the meal for which the restaurant receives pay. Music is not a necessary incident to the service of food; the guest who pays for a meal cannot insist upon having music during meals. Music is played only during certain hours, although meals are served at all hours, and the price of food and service is the same during the time when music is played as it is when the music is not furnished.

It may be assumed that the purpose for which the music is played is to attract patrons. This brings us back to the question whether the purpose with which the free performance is given, determines its character as a performance for profit in the absence of any proof as to whether the free music actually increases the patronage and the gross receipts of the restaurant from sale of food. The added profits, if any, flowing from the free performance of music, are remote, conjectural and speculative.

If it is true that every free performance of music is for profit simply because it is given in the hope of attracting trade and business or because the performers profit by reason of compensation received, then not only hotels and restaurants but many other establishments will be affected as well as the musicians themselves. Paid musicians giving a free performance of copyrighted music at any public meeting would be subject to a royalty.

Counsel for petitioner claims that no musicians or other artists who are paid to give a public performance are exempt from the provisions of the act requiring payment of royalty unless they come within the exceptions enumerated in Section 28 of the act, which provides that:

> "Nothing in this act shall be construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses or octavo choruses by public schools, church choirs or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

If this is true the members of an orchestra who receive compensation for their services would be subject to royalty even though they gave a concert for charitable or educational purposes, because section 28 only excepts performances of specified musical works by *public schools, church choirs or octavo choruses.*

The usual free band concert given municipalities for the pleasure and edification of its citizens would require a royalty to be paid by the musicians for each copyrighted selection performed, because the musicians were compensated.

A musician employed to play or sing a piece of copyrighted music in order to attract trade and sell the music for the mutual profit of the composer and the dealer would be giving a public performance for profit and subject to royalty. In this case the absurdity of counsel's contention is forcibly illustrated because the composer would be entitled to receive three distinct royalties: 1.

From the publisher on the sale to the dealer. 2. From the dealer, because he procures a public performance for profit to be given. 3. From the musician who gives the public performance for profit.

B.—There is no Conflict Between the Federal and State Courts.

The citation by appellant of the Weistblatt case (58 Misc., 328) to support his argument that the Supreme Court of New York has held in an analagous matter that in an "indirect way a profit was made" out of a moving picture show operated as an inducement to draw trade to an ice cream saloon, although no entrance fee was charged to such show; and, therefore, that there is a conflict between the State Court and Federal Court, is misleading.

The Weistblatt case was decided by the Supreme Court at Special Term in 1908. In 1912 the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of People v. Martin, 137 N. Y. Supp., 377, which held that a cabaret show in a restaurant was not a public performance for profit, and hence required no license.

Again, in the case of People v. Wacke, 77 Misc., 196, decided by the County Court, Kings County, in June, 1912, that court held that one conducting a hotel is not guilty of violation of an ordinance which prohibits conducting a common show without a license, by exhibition in such hotel of moving pictures, no admission fee being charged. The court said, at page 300:

> "The defendant was not engaged in the moving picture business. He was conducting

a hotel and was engaged in the hotel and liquor business. He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore. The case of People vs. Royal, 23 A. D., 258, seems to me to be decisive of the question under consideration."

In the Royal case the Appellate Division of the Supreme Court held that a person who hires a room where he illustrated tricks and devices of gamblers for the purpose of selling a book, no admission fee being charged, is not engaged in conducting an exhibition which required a license. The court said the *sale of the book*, not the exhibition, was the principal thing. So in this case, the *sale of meals*, and not the performance of music, is the principal thing and the source of profit, if any, to the hotel. In the Royal case the court said:

"It is not denied but that the word exhibition, in its broad significance, would embrace what the defendant did in this case. But it is quite evident that the word, as used in the ordinance in question, is so used in a sense much more restricted. Given its broadest signification, there are a large class of business men that use various methods to attract custom and sell their goods that would be brought within its terms. Every contrivance for the automatic movement of dumb figures, used in display windows to attract attention, every exhibit of paintings for sale or to arouse interest and to attract visitors to public marts of trade, every person exhibiting exercising apparatus through the medium of an automaton or human being, every per-

son displaying advertising matter, pictures and designs by means of a stereopticon, are a few of the very many things which would be brought within this ordinance if the word were to be construed in its general sense. The connection in which it appears in the ordinance shows that its meaning has relation to entertainments where the exhibition itself is the principal thing and from which the exhibitor derives or expects to derive profit."

All these cases, which were cited and considered by the Circuit Court of Appeals in the Hilliard case, show that the State Courts and the Federal Courts are not in conflict in regard to the principle involved in the case at bar.

C.—The Sarpy Case Distinguished.

The case of Sarpy v. Holland was followed by Mr. Justice Lacombe in granting the original injunction order which was reversed by the Circuit Court of appeals. This is the only case which the learned counsel for the publishers, both in the Hilliard case and the Shanley case, have been able to find, in their exhaustive research of the books, in support of their contention that a gratuitous performance of music is for profit if given as an incident to any business enterprise. The court decided the Sarpy case under Section 1 of the English Copyright Act of 1882, which is as follows:

"On and after the passing of this Act, the proprietor of a copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively *the right of public*

> *representation or performance of the same,* shall print or cause to be printed upon such title page of every published copy of such musical composition a notice to the effect that *the right of public representation or performance is reserved.*"

The Sarpy case is distinguishable from the case at bar. It will be noted the English statute confers greater rights upon the composer than the American. Neither the words "for profit" nor any equivalent expression appear in the English Act; hence, any public performance, whether it is for profit or not, is an infringement. The English Act gives the copyright owner of a musical composition the same rights which the United States Copyright Act gives to the owner of a drama or dramatico musical composition.

D.—As to the Meaning of Section 28.

Although in Section 1, Subdivision E of the Copyright Act the right of the owner of the copyright is limited "to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit," yet counsel for the petitioner contends that this provision is meaningless because of the provisions of Section 28 of the Copyright Act, which is as follows:

> "Any person who wilfully and for profit shall infringe any copyright secured by this act * * * shall be deemed guilty of a misdemeanor * * * provided, however, that nothing in this act shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas,

masses or octavo choruses by public schools, church choirs or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, provided the performance is given for charitable and educational purposes and not for profit."

It is contended that the foregoing provision "indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes, and of the classes above enumerated." (Petitioner's brief, page 16). To so hold would absolutely nullify the provisions of Section 1, subdivision E, because under that sub-division a public performance of any musical composition can be given by any one if not for profit.

POINT III.

When an arrangement of a vocal number or a selection from a copyrighted dramatic work is separately copyrighted, published and sold, as a musical composition, it becomes such in law as well as in fact.

A notice of copyright in a musical composition is notice that it may not be performed publicly for profit. Section 1, subdivision E, of the Copyright Law gives no other or additional right to the copyright owner.

A separate publication, dedication and copyright of such musical composition does not necessarily forfeit any of the dramatic rights which the owner has in the same piece. He is still pro-

tected in his dramatic performing right by his copyright of the opera of which such song forms an integral part, and, as Judge Hand said in the Shanley case (222 Fed. Rep., 344):

> "If the performance had been anything beyond the least essentials of a musical reproduction of a copyrighted song, it would be protected; (that is against any public performance, regardless of whether it was for profit), but it was not."

There can be no two opinions as to the intent of Congress to distinguish sharply between dramatic works and musical compositions. While it is true that Section 5 provides that "no error in classification shall invalidate or impair the copyright protection secured under this Act," we assume the converse is also true, and that a composer cannot gain dramatic protection under paragraph D of the Act for a musical composition which belongs under paragraph E, simply because such copyright owner arbitrarily and unjustifiably classifies a plain musical composition as a dramatico musical composition.

Rule 9 of the Copyright Office, Rules and Regulations provides as follows:

> "9. Dramatico musical compositions include principally operas, operettas and musical comedies or similar productions *which are to be acted as well as sung.*
>
> *Ordinary songs even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas should be registered as musical compositions not dramatico musical compositions.*"

The vocal number "Sweethearts" is clearly not a dramatic work, nor is there any such claim by appellants. Their claim is based upon the fact that the song is a part of a dramatico musical work and is, therefore, entitled to the protection of paragraph D of Section 1 of the Act.

The appellants ignore the fact, however, that by their own act they have taken this vocal number out of the class of dramatico musical works because they have separately copyrighted, published, and sold it as a musical composition. Judge Hand in his opinion rendered on the dismissal of the bill of complaint succintly stated the situation as follows:

> "However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever may be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated."

It is also important to note that a selection containing all the numbers of the comic opera "Sweethearts" was separately copyrighted, published and sold as a musical composition, and orchestrations thereof were also separately published and sold to all persons, including conductors of orchestras and leaders of bands.

Is it not fair to conclude from these facts that a license was thereby granted to the purchasers thereof to publicly perform such selections? Can

it reasonably be said that the leader of a band would buy an orchestration of a musical work for any purpose other than a public performance? Nor is the leader of an orchestra any more likely to purchase a full orchestration for strings, brass clarinets, drums, etc., for his private amusement.

The copyright owner has exclusive right to publicly perform the opera "Sweethearts" and to derive full financial benefit therefrom, but he has sought to obtain additional revenue by separately selling the vocal and instrumental numbers as musical compositions, and in so doing, under the provisions of the Act, he has ceased to have the exclusive right to publicly perform such numbers as musical compositions only.

No claim is made that the appellants have lost their exclusive dramatic performing right in the operetta or any portion thereof.

POINT IV.

The ruling of the Court below does not introduce a new requirement as to notice of copyright.

Counsel for the petitioner contends that the court below held "that the proprietor of a general copyright in an operatic work loses the dramatic performing right in any vocal number or selection therefrom separately published or copyrighted as a musical composition in case he fails to insert on such separate publication a notice stating that the entire operatic work was copyrighted." We do not understand that to be the ruling of the court below. The Circuit Court of Appeals states clearly the different rights which inure to the

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owner of a copyright of a dramatic or dramatico-musical compositions, and the owner of a copyright of a musical composition respectively. In the opinion it is stated,

> "The act gives the author of any dramatic or dramatico-musical composition who takes "out a copyright thereon, two distinct and "and separable rights. 1. It gives him the "sole right to print and sell copies of the "words and music; and 2. The sole right to "publicly perform it; and it gives the author "of a musical composition, in like manner, "two separable rights. 1. The right to print "and sell copies of the words and music. 2. "The right to perform the copyrighted work "publicly for profit."

It is therefore clear that a musical composition may be performed publicly under any circumstances if not for profit.

The court, assuming but not deciding, that a valid copyright had been acquired on that portion of the opera which was republished as a musical composition, concluded that, considered as a musical composition the owners of the copyright could not complain, because a public performance was given, which was not for profit. The song as sold in sheet music form, in the form attached to the record, indicates to the purchaser that it is merely a musical composition, and the notice of copyright affixed thereto only gives notice that the copyright is claimed on a musical composition. The court intimated that if the petitioners seek to reserve to themselves the additional rights prescribed by the statute for dramatico-musical works, that some additional notice should be affixed so as to notify a purchaser

that they are purchasing not a musical composition but a dramatico-musical composition. This observation by the court was merely in the nature of an illustration to show the injustice of the petitioner's claim, because it is stated in the opinion "whether if they had inserted a notice of the previous copyright they could have retained the advantages of it as to the republished song we need not now consider."

CONCLUSION.

We respectfully submit that the writ of certiorari prayed for be denied, and the petition dismissed.

Respectfully submitted,

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

Abraham S. Gilbert and
Francis Gilbert,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED de GRESAC MAUREL, and G. SCHIRMER, Inc.,

Petitioners,

vs.

THE SHANLEY COMPANY,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE AND TO PLACE ON THE SUMMARY DOCKET.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 1277-78-79 Broad.

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No. 924.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE AND TO PLACE ON THE SUMMARY DOCKET.

Come now the petitioners in the above entitled cause, by their counsel, and move the court to advance the case for hearing at the next term and to place the same upon the summary docket.

The case involves the question whether the unlicensed performance in a cabaret of a selection from a dramatico-musical composition, copyrighted

by the petitioners, when no charge for admission to such performance is directly made, is a violation of the rights secured to the petitioners under the Copyright Laws of the United States. There is also involved the question whether the dramatic performing right in such selection is lost because of the omission on the separately copyrighted publication of such selection of notice of the copyright of the entire work, although there is inserted on such republication a copyright notice which is identical with the copyright notice on the entire work.

The case is typical in its facts of many others similar thereto. If the appropriation of the composition in this case constitutes a violation of the copyright, the appropriation for cabaret performance by the defendant or by others of other similar compositions of the petitioners, or of other composers, likewise constitutes a violation of the rights of the copyright proprietors. The case, therefore, is one of general public interest.

The question is one of statutory construction, and one which will not require extended argument. It is submitted, therefore, that it is a proper case to be advanced for early hearing on the summary docket.

Notice of this motion has been served an opposing counsel.

NATHAN BURKAN,
WM. J. HUGHES,
Counsel for Petitioners.

May, 1916.